QUESTIONS PRESENTED FOR REVIEW

1. Whether Police Officers, Employed by the Puyallup Indian Tribe, But Trained, Certified, and Cross-Commissioned by the State of Washington, and Armed, Equipped, and Provisioned by the United States, Are Subject to the Constitution, U.S. Civil Rights Laws, and State Tort Law;

2. Whether the Shelter or Conceal Clause of the Treaty of Medicine Creek, and Additional Sources of Federal and State Law, Preempts Any Claims of Qualified Immunity by Individual Puyallup Tribal Police Officer Defendants in a Suit for Violation of the Constitution, U.S. Civil Rights Laws, and State Tort Law.

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10. *Young v. Duenas*, 164 Wn.App. 343, 262 P.3d 527 (Div. I, 2011).

II. BASIS FOR JURISDICTION

The Washington State Court of Appeals rendered the Decision Below on September 12, 2011. The Decision Below was subsequently published. The Washington State Supreme Court denied the Petition for Review.

This court has jurisdiction because the Decision Below is repugnant to the Constitution, treaties, or laws of the United States. 28 USC 1257(a).

III. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1. U.S. CONSTI. amend. IV.
   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

2. U.S. CONSTI. amend. VII.
   "The right of trial by jury shall be preserved."

3. U.S. CONSTI. amend XIV, cl. 3.
   "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. Treaty with the Nisqualli, Puyallup, Etc. 1854, Art. 8, U.S. – Puyallup Ind. Tribe, 2 Kappler 663, 10 Stat. 1132 (1854) ("Treaty of Medicine Creek, or, "Treaty")
   "And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."

5. 42 U.S.C. § 1981(a).

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory … to the full and equal benefit of all laws and proceedings for the security of persons."

6. 42 U.S.C. § 1981(c).
"The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

7. 42 U.S.C. § 1983.
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8. 42 U.S.C. § 1988(b).
"In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title … the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

9. 25 U.S.C. § 1322(a).

"The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

10. 25 U.S.C. § 1324.
"Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have

appropriately amended their State constitution or statutes, as the case may be."

11. 25 U.S.C. § 1326.
"State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

IV. STATEMENT OF THE CASE

1. Factual Background

Dr. Jeffry Young was killed one evening in the spring of 2007 after wandering onto the Puyallup Indian Reservation in Pierce County, Washington.

There is no question that Dr. Young was behaving erratically that day. He identified himself at the tribal clinic as a doctor[1] and said he needed to see his patients, even though he had no such patients. He then proceeded to identify two different tribal

[1] Dr. Young has a Ph.D. from Berkeley.

employees as the anti-Christ and asked each for protection from the other.

But there is also no question that he was passive and non-violent. The investigative reports by the City of Tacoma and the U.S. Bureau of Indian affairs establish that he was unarmed and non-threatening. He never raised his voice, kicked, punched, or otherwise harmed, or even threatened to harm, the police officers in anyway.

Nonetheless, the police officers decided to take him into custody.[2] Accordingly, they kicked his feet out from under him so that he fell face-down onto the pavement. The officers then piled on top of him, so that several hundred pounds of officers, plus Dr. Young's own three hundred or so pounds, weighed heavily on his lungs and heart. They also stunned Dr. Young three or four times with a Taser and cuffed him by his wrists and ankles.

A fourth officer then appeared and noticed that Dr. Young's lips were blue and he had stopped breathing. The officers then removed the cuffs, performed CPR, and called an ambulance.

It was too late.

One of the officers called his wife on his cell phone and stated: "I can't believe I just killed a man with my own hands."

Dr. Young's forensic pathologist, Dr. Carl Wigren, determined that Dr. Young died of cardiac dysrhythmia, induced by hypoxia, caused by the strain and excessive force and weight the officers applied to his lungs and chest. The Pierce County

[2] Dr. Young was never arrested or charged with any kind of offense.

coroner determined that the cause of death was excited delirium.

The police officers were employed and commissioned by the Puyallup Indian Tribe, a federally recognized Indian Tribe and successor-in-interest to the Puyallup Indians that signed the Treaty of Medicine Creek with the United States in 1854. *Treaty of Medicine Creek*, 10 Stat. 1132 (1854).

The police officers were trained and certified by the State of Washington. They were also cross-commissioned by the State, pursuant to an agreement with Pierce County and the City of Tacoma, and a separate agreement with the City of Fife. They were armed, equipped, and provisioned by the United States, pursuant to a P.L. 96-638 Indian Self Determination Act contract with the U.S. Bureau of Indian Affairs.

2. Procedure

Dr. Young filed a complaint alleging violation of civil rights and various state-law torts in Puyallup Tribal Court in November, 2009. The defendants in the tribal court lawsuit were the Puyallup Indian Tribe, the three individual police officer Defendants here, the chief of police, and the security guard.

The tribal court refused to hear Dr. Young's motion for default. It then scheduled what it deemed a "Sua Sponte Motion and Order to Appear for a Pre-trial Conference." This order was issued without any briefing of any kind from either party. It establishes the tribal court's interest in dismissing the case with prejudice "because the court lacks subject matter jurisdiction based upon the doctrine of sovereign

immunity." *Young v. Puyallup Indian Tribe*, Puyallup Tribal Court, Sua Sponte Motion and Order to Appear, Jan. 4, 2010.

Dr. Young then filed a motion to dismiss his own case. It was granted. *Young v. Puyallup Indian Tribe*, Puyallup Tribal Court, Order on Motion to Strike and Dismiss, January 26, 2010.

Dr. Young then filed another complaint in Pierce County Superior Court. While the claims were virtually the same as those in tribal court, the parties were not. The Puyallup Indian Tribe was not a party. In addition, the police chief and the security guard were subsequently dismissed.

The Defendants brought a CR 12(b)(1) motion to dismiss. The Superior Court granted the motion.[3] Dr. Young moved for reconsideration. The motion was denied.

Dr. Young appealed to the state court of appeals. The court of appeals affirmed, addressing all of the federal questions raised in this Petition. The paragraph in the Decision Below addressing the shelter or conceal clause of the Treaty is as follows:

> Young next argues that the 1854 Treaty of Medicine Creek constituted a limited but express Congressional abrogation of the Puyallup Tribe's sovereign immunity. 10 Stat. 1132

[3] The Superior Court Order did not make any findings or any specific reference to the legal arguments made by either party, including Dr. Young's arguments concerning the shelter or conceal clause and the other matters of federal law. However, the hearing included a vigorous discussion of federal Indian law and the issues raised in this Petition.

> (1854). He argues that under the treaty, the Puyallup Indians shall not "shelter or conceal offenders against the laws of the United States, but deliver them up to the authorities for trial." 10 Stat. 1132, art. 8 (1854). Young's argument is unpersuasive. The treaty is inapplicable on its face. The tribe is not concealing any offenders accused of violating United States law. Additionally, waiver of tribal sovereign immunity must be explicit and unequivocal. *Santa Clara Pueblo*, 436 U.S. at 59. The language of the treaty does not constitute such an explicit or unequivocal abrogation of sovereign immunity here. Young also expressly conceded to the Puyallup Tribe's sovereign immunity in his brief.

Decision Below at 8.

The Decision Below was subsequently published. Dr. Young petitioned for review to the Washington Supreme Court. The petition was denied.

3. Standard of Review

This Petition comes to this Court on a motion to dismiss for lack of subject matter jurisdiction. Thus, the standard of review is the light most favorable to the non-moving party. *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 120, 147 P.3d 1275, 1282 (2006) (Madsen, J., concurring) ("On review, this court may consider the evidence presented in support of, and opposition to, the CR 12(b)(1) motion, viewing

the evidence in the light most favorable to the nonmoving party.") Here, Dr. Young is the non-moving party.

V. ARGUMENT FOR ALLOWANCE OF WRIT

1. This Court Should Grant the Petition to Ensure that Tribal Police Officers Who Are Trained, Certified, and Cross-Commissioned by the State, and Armed, Provisioned, and Equipped by the United States, Are Subject to U.S. Civil Rights Laws.

U. S. citizens should be protected by the civil rights laws of this country everywhere within the jurisdiction of the United States. However, U.S. civil rights laws do not apply to tribal government.

The various Indian tribes in what is now the United States were not invited to the Constitutional Convention and did not send delegates. *See, e.g. Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756, 118 S.Ct. 1700, 1704, 140 L.Ed. 981 (1998). Likewise, when Congress extended the Bill of Rights to the various states via the Fourteenth Amendment, it did not extend it to tribal government. *U.S. Consti, Amend*. XIV.

Thus, tribal government is not constrained by the Constitution. *Santa Clara Pueblo V. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675 (1978). Tribal government is free to violate the civil rights of its own tribal members and those who come within its

jurisdiction with virtual impunity, subject only to the Indian Civil Rights Act ("ICRA"). 25 USC 1302.

ICRA extends some, but not all, of the Bill of Rights to tribal government. *Id.* Two civil rights that most citizens take for granted, but do not apply to tribal government, are the right to a trial by jury in civil cases and the right to enjoy the privileges and immunities of citizens of other states. *Cohen's Handbook of Federal Indian Law* (LexisNexis: 2005) § 14.04[2].

Moreover, the Indian Civil Rights Act does not waive tribal sovereign immunity and is only enforceable in tribal court. *Santa Clara Pueblo* at 56 – 57. Thus, even the constraints it *does* impose on tribal government are subject to the caprice of the tribal court system.

Unfortunately, this case does not present this Court with the opportunity to extend the nation's civil rights laws to tribal government because the Puyallup Indian Tribe is not a party to this case and the party seeking review is not a tribal member.

However, this case *does* present this Court with the opportunity to extend the nation's civil rights laws to non-tribal members who find their civil liberties threatened by non-tribal member *employees* of tribal government in the Pacific Northwest. This category of persons includes virtually everyone who, like Dr. Young, find themselves traveling through, or visiting, an Indian reservation in the Pacific Northwest.

Police officers who are employed by a federally recognized Indian tribe, but trained, certified, and cross-commissioned by state law, and provisioned, armed, and otherwise equipped by the United States, ought to be held to the same Constitutional standards

as their state and federal colleagues. However, this is not the law of the State of Washington. This Court should grant this Petition to make it so.

2. This Court Should Grant the Petition in Order to Prevent Tribal Government from Depriving U.S. Citizens of Their Constitutional Rights Without the Citizen's Knowledge and Consent.

It is fundamentally unfair to deprive a U.S. citizen of his civil rights without his knowledge or consent. However, that is precisely what happened to Dr. Young. When he wandered onto the Puyallup Reservation that fateful evening, Dr. Young saw no evidence to indicate that he was entering into a foreign jurisdiction outside the reach of U.S. civil rights laws.

He did not, for example, show his passport to a customs official or meet people who spoke a foreign language. Neither did he see any signage, fences, longhouses, totem poles, or other indications that he had entered the territory of a quasi-sovereign nation and warning him that he was no longer protected by the Constitution.

Indeed, the Puyallup Reservation is one of the most urban in the country. One-fifth of the Reservation is within the city limits of Tacoma, the second largest city in the State of Washington. Richard Slagle, *The Puyallup Indian Tribe and the Reservation Disestablishment Test*, 54 Washington Law Review 653, 653 (1979). Other portions are

within the limits of other municipalities, all incorporated pursuant to state law, not tribal law.

In addition, the Puyallup Reservation is not, primarily, inhabited by tribal members. According to the latest U.S. Census, over 46,000 people live within the exterior boundaries of the Reservation. U.S. Census Bureau, Am*erican FactFinder, Profile of Puyallup Reservation and off-Reservation Trust Land, WA*. 2010 data. However, only 420 or so of these people are enrolled members of the Puyallup Indian Tribe. U.S. Census Bureau, *American FactFinder, Census 2000 American Indian and Alaska Native Summary File (AIANSF)*.[4]

Likewise, land within the Puyallup Reservation is not, primarily, owned by tribal members or the United States in trust for tribal members. In 1977, the tribal land base was a mere twenty-two acres. *Puyallup Tribe v. Dept. of Game of Washington*, 433 U.S. 165, 174, 97 S. Ct. 2626, 2622, 53 L.Ed. 2d 667, 675 (1977). Today, it is not significantly different.[5]

Pursuant to the Decision Below, a U.S. citizen who wanders onto the Reservation and is killed by tribal police has no recourse in a court of law. While this might be acceptable if the citizen *knowingly* entered the Reservation and *knowingl*y gave up his civil rights, it is completely *unacceptable* if he did not. This court should grant the Petition to protect unwary U.S. citizens from the laws of a foreign jurisdiction

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[4] This writer does not know precisely how many people are enrolled members of the Puyallup Indian tribe today.

[5] The Tribe has acquired land through litigation, purchase, and gift from the United States since 1977. How many acres is unknown to this writer.

when the citizen is unaware that he is *in* a foreign jurisdiction.

3. This Court Should Grant the Petition to Protect U. S. Citizens from Tribal Court Systems that Lack Basic Guarantees of Fairness and Impartiality.

While the Puyallup tribal court was, by definition, competent to hear disputes between tribal members, it was *not* competent to hear the dispute between Dr. Young and the Defendants. A tribal court is not a court of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367, 121 S.Ct. 2304, 2314, 150 L.Ed. 398 (2001). It does not have jurisdiction over civil rights claims. *Id*. at 2315.

Even if tribal court *had* jurisdiction, it would not be required to exercise it consistent with Dr. Young's civil rights. While the Puyallup Tribal Constitution asserts jurisdiction over "all people" within the Reservation, *Puyallup Tribe Consti,* Art. I, it only recognizes the civil rights of members. *Id*., Art. VII. Dr. Young had no rights under the tribal Constitution.

Federal law as articulated by the Decision Below does not provide Dr. Young with any meaningful rights either. As previously discussed, ICRA relies on *tribal* court to protect *federal* rights. *Santa Clara Pueblo* at 65. The only federal remedy for a deprivation of the civil rights guaranteed by ICRA is a writ of *habeas corpus* to federal court. 25 USC § 1303.

But here, Dr. Young was not imprisoned by tribal authority, rather, he was *killed* by tribal authority. *Habeas* relief was precluded by the *facts*, if not by the *law*.

Moreover, at least during the time period that Dr. Young was attempting to litigate in tribal court, the court did not maintain a written record of decisions. Thus, relevant tribal law did not exist outside the four corners of the published code.[6]

Today, the code consists of 15 titles published on the Internet, none of which establish, or even mention, any tribal-law analogue to any of Dr. Young's U.S. civil rights claims or his state-law tort claims. *See Puyallup Tribal Code*. When Dr. Young was in tribal court three years ago, tribal code consisted of one three-ring binder, two and one-half inches thick.

The so-called waiver of tribal immunity in the Puyallup Tribal Tort Claims Act was of no comfort to Dr. Young either. First, the tribal court did not appear to be aware of it. The tribal court, without any briefing from either party, and entirely on its own volition, brought a motion to dismiss Dr. Young's claims based on sovereign immunity. This was the very same sovereign immunity that the tribal tort claims act supposedly waived.

Even if the tribal court *had* been willing to consider the tort claims act, it would not have been

[6] If tribal law exists in the custom, usage, and memories of certain tribal members, it is unavailable to Dr. Young. Dr. Young has no history with the Puyallup Reservation, no personal relationship with any tribal member, and therefore has no way of knowing what tribal custom and usage might be, even if it does exist and is somehow part of tribal law.

much help to Dr. Young. The Tribal Tort Claims Act does not waive sovereign immunity for most of Dr. Young's claims. It is, afterall, a tort claims act, not a civil rights act. See Puyallup Tribal Code § 4.12.010 *et. seq*. This Court should grant the Petition so that Defendants like Dr. Young will be guaranteed a fair and impartial forum in which to vindicate their civil rights. Claims against police officers who are employed by an Indian tribe, but trained, certified, and cross commissioned by the state.

4. This Court Should Grant the Petition Because Existing Case Law Focuses on Indian Treaty *Rights* But Ignores Indian Treaty *Responsibilities*.

The Treaty of Medicine Creek imposes mutual rights and responsibilities on each side. However, case law to date has focused almost exclusively on Indian treaty *rights* and has been conspicuously silent on their treaty *responsibilities*.

The Treaty was signed the day after Christmas, 1854, between Governor Isaac Stevens, on behalf of the United States, and representatives from the Native American tribes and bands that lived in what is now Pierce County, including the Puyallups. *Treaty* at preamble.

During the next ten months, Stevens signed an additional nine treaties with other Indians residing between the Pacific Ocean to the west and the Judith River in Montana to the east and between the Canadian border to the north and the Columbia River to the south.

Per the terms of the Treaty, the Indians ceded sovereignty over a large swath of territory south of present-day Seattle and north of the Skookumchuck River. *Id.* at Art. 1. However, they retained two aspects of their former sovereignty over the ceded territory: 1) the right to take fish at usual and accustomed places in common with the citizens of the territory, ("fishing clause") and 2) the privilege to hunt, gather roots and berries, and pasture horses on open and unclaimed land. *Id*. at Art. 3.

The Indians also retained their aboriginal sovereignty over three small parcels of land. *Id*. at Art. 2.[7] However, tribal sovereignty, even on those parcels, was explicitly limited in eight ways. A local historian has summarized the treaty's limitations on the tribes' aboriginal sovereignty as follows:

1) Dependence on United States;
2) Friendship with whites and other Indians;
3) Delivery of lawbreakers to white authorities;
4) Prohibition of the sale or use of liquor;
5) Deductions from annuities to pay for stolen goods;
6) Abolition of slavery;
7) Prohibition of trade outside the United States; and
8) Exclusion of foreign Indians from the reservation;

Kent D. Richards, *Isaac Stevens: A Young Man in a Hurry*, (Washington State University Press: 1993,

[7] Two of the original three Reservations were moved and enlarged by Executive Order in 1857. *See, e.g*. Murray Morgan, *Puget's Sound*, (University of Washington Press: 1979) 130.

orig. pub. Brigham Young University Press: 1979) 200.

The fishing clause of the Stevens' Treaties has been the source of continuous litigation for the last half century. This Court has rendered seven different opinions regarding the fishing clause.[8] The Puyallups themselves were party to three of those seven cases.[9]

While Indian treaties *rights* have been litigated *ad infinitum*, Indian treaty *responsibilities* have been litigated scarcely at all. Indeed, this court has only discussed the shelter or conceal clause once before. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) (holding that Indian tribes do not have criminal jurisdiction over non-members). Likewise, the shelter or conceal clause has only been mentioned in three different opinions in state court, including the Decision Below.[10]

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[8] The seven Supreme Court Stevens treaty fishing clause cases include the three Puyallup cases identified in the next footnote, plus the following: 1) *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); 2) *Seufert Brothers Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1930); 3) *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); and 4) *Washington v. Washington State Commercial Passenger Fishing Vessel ("Fishing Vessel*,") 443 U.S. 658, 99 S.Ct. 3055 (1979).

[9] The three "Puyallup" cases are: 1) *Puyallup Tribe v. Washington Game Dept*. ("*Puyallup I*"), 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed. 689 (1968); 2) *Washington Game Dept. v. Puyallup Tribe*, ("*Puyallup II"*) 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed. 254 (1973); and 3) *Puyallup Tribe v. Dept. of Game of Washington ("Puyallup III)*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed. 2d 667 (1977).

[10] The shelter or conceal clause has been mentioned in the following state cases: 1) *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332 (1993) (holding that tribal police officer has inherent

The shelter or conceal clause requires the Indians to deliver offenders against United States law to the authorities for trial:

> And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Treaty, Art. 8.

Here, the civil rights claims are laws of the United States. The authority for trial is Pierce County Superior Court. The Puyallups should deliver up the Defendants for trial. This Court should grant the Petition to bring a better balance between Treaty rights and Treaty responsibilities.

5. This Court Should Grant the Petition to Ensure that Stevens Treaty Case Law Is Grounded in the Historical Understanding of the Parties to the Treaties.

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sovereign authority to detain non-tribal members on public rights-of-way on the Reservation); 2) *State v. Eriksen*, 170 Wn.2d 209, 241 P. 3d 399 (2009) (holding that a tribal police officer has inherent sovereign authority to engage in fresh pursuit of non-tribal member across Reservation boundary); 3) *State v. Eriksen*, 172 Wash.2d 506, 259 P.3d 1079 (2011)(Reversing the previous opinion and holding that a tribal police officer does *not* have inherent authority to pursue suspects outside the Reservation boundary); and 4) The Decision Below. The second *Eriksen* case determined that the shelter or conceal clause was irrelevant because the relevant facts occurred off-reservation. *Eriksen* at 513, 1083. The Decision Below determined that the shelter or conceal clause was "inapplicable on its face." *Young v. Duenas*, 164 Wn. App. 343, 352, 262 P.3d 527 (Div.1 2011).

Dr. Young's right to a fair trial is grounded in the contemporaneous understanding of the parties to the Treaty. This understanding takes precedence over the Defendants claims of sovereign immunity because treaties are the supreme law of the land. *Cohen* at § 5.01[3], U.S. CONSTI. ART. VI, cl. 2.

The goal of treaty interpretation is to determine what the parties meant by the terms of the treaty. *United States v. Washington*, 157 F.3d 630, 642 (9th cir. 1998). It is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

Two narratives from treaty time shed light on how the parties to the treaties understood them – the story of Leschi and the story the Muck Creek Five.

Chief Leschi is perhaps the most well-known Native American leader of the Nineteenth Century in what is now Washington State. Kelly Kunsch, *The Trials of Leschi, Nisqually Chief*, 5 Seattle Journal of Social Justice 67, 67 (2006). Students of history will find Leschi's "X" mark third from the top after Stevens' own signature on the Treaty. *Treaty* at 663.[11] They will also find him in the history books as a ring leader of the Indian Wars of the Pacific Northwest.

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[11] One witness to the treaty Council, the Nisqually Indian John Hiton, asserted fifty years after the fact that Leschi refused to sign the treaty and, in fact, tore it up, threw it at Steven's feet, and stormed off, never to return. SuAnn Reddick and Cary C. Collins, *Medicine Creek to Fox Island*, 106 Oregon Historical Quarterly No. 3 (2005) 383.

Leschi was hung in February, 1858, after a white jury convicted him of killing a white volunteer officer named Colonel Moses.[12] Some of Leschi's white contemporaries and many, if not most, of today's historians, view him as innocent. In the alternative, they believe that Col. Moses' death was excusable because Leschi and his followers were at war with the settlers. *See Kent D. Richards* at 256 – 312, Morgan at 101 – 135, Richard Kluger, *The Bitter Waters of Medicine Creek* (Knopf: 2011).

Washington's legislature asked the Washington Supreme Court to "re-try" Leschi in 2004, a century and half after his execution. *Kunsch* at 67. In Leschi's third trial, he was found not guilty. *Id*. at 68.

Regardless of Leschi's guilt or innocence, he was captured and tried in a territorial court. Nothing in the Treaty or the doctrine of sovereign immunity protected him from the operation of federal law. The contemporaneous understanding of the treaty, by the whites and the Indians, was that offenders against the laws of the United States would be held accountable in a court of law.

Here, the analogy between Leschi and the Defendants is imperfect. Leschi was accused of a capital crime – murder. The Defendants are accused of a civil rights crime. However, neither Leschi nor Col. Stevens distinguished between U.S. civil law or U.S. criminal law. To them, it was all U.S. law. There is no principled reason to extend the writ of U.S. law over crimes, but not over civil rights violations.

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[12] Leschi was found guilty after his second trial. The first trial ended in a hung jury. *See* Morgan and Richards, *supra*.

A better analogy from treaty times is between the Defendants and the Muck Creek Five. Whites and Indians had lived together in the South Sound in relative harmony for some twenty years before the coming of Col. Stevens. Many of these settlers were former employees of the Hudson's Bay Company who had intermarried. *Richards* at 274, *Morgan* at 122. Others were, as Richards put it, "half-breeds." *Richard*s at 274.

When war broke out, many of the in-laws and half-breeds saw no reason to abandon their homesteads and move into town or a cramped blockhouse with their neighbors. *Id*. Gov. Stevens deemed this treason. During a "sweep" of the Upper Nisqually and Puyallup rivers, Steven's volunteer militia stumbled upon five of the "half breeds" who lived at Muck Creek, seized them, and locked them up. *Morgan* at 122.

Outraged by the detention of U.S. citizens without charges or representation, two volunteer lawyers then engaged in a 160-mile roundtrip canoe journey to the nearest judge to obtain a writ of *Habeas Corpus* on behalf of Defendants. *Id*. Stevens then declared martial law and closed the territorial court. *Id*. The judge attempted to hold court anyway, but eventually decided to go to jail himself, rather than risk a gun battle between the federal deputies and Stevens' militia. *Id*.

Because Stevens had closed the territorial court, the Muck Creek Five were tried by a military court. The military court eventually dismissed the cases on the grounds that it lacked authority over civil charges, such as treason. *Morgan* at 126 – 129, *Richards* at 282 – 285.

Here, the Defendants are in a legal posture similar to the Muck Creek Five. While the Muck Creek Five were brothers-in-law and/or half-siblings to various members of the Puyallup and Nisqually tribes, the three police officers are *employees* of the Puyallup Tribe. While the territorial court of the treaty-making era had jurisdiction over the civil allegation of treason, the state court of today has jurisdiction over the civil rights claims.

Neither the Treaty nor the principle of sovereign immunity should be allowed to protect today's Defendants from trial. This court should grant the Petition to interpret the Treaty of Medicine Creek consistent with the parties' intent.

6. This Court Should Grant the Petition to Ensure that Stevens Treaty Case Law is Grounded in the Legislative History of the Treaties.

Dr. Young's right to a fair trial is also based on the legislative history of the Treaty. One of the best sources for this history is House Report No. 474. *H.R. Report 474*, 23rd Cong., 1st Ses. (1834). This report establishes that non-Indians living in Indian country because of their jobs, and non-Indians traveling through Indian country, were protected by, and subject to, United States law.

> Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection of, and subject to,

> the laws of the United States. To persons merely travelling in the Indian country, the same protection is extended.

Id. at 18.

Here, the Defendants are officers and their presence on the Reservation is a direct result of the Treaty. They should be subject to the laws of the United States.

More directly, Dr. Young was travelling through the Reservation. Therefore, he is protected by the civil rights laws of this country. He did not abandon his civil rights when he wandered onto the Reservation.

Furthermore, H.R. Rep. 474 provides that federal Indian agents, not the tribes themselves, are supposed to remove "unprincipled white men" from Indian country. *Id*. at 98.

Here, the tribe did not wait for the federal agents to remove Dr. Young. Instead, it engaged in self help, with tragic results.

H.R. Rep. 474 also contains a concrete proposal to enforce federal law against law breakers in Indian country.

> The commissioners, therefore, beg leave very respectfully to suggest the expediency of organizing this Indian territory for the sole purpose of enforcing the laws of the United States, as far as they are applicable to the Indian country. One governor, a secretary, a marshal, a

> prosecuting attorney, and a judiciary, with adequate clerks, will be necessary. The Board has not been able to decide upon the number of judges.

Id. at 101. This recommendation addresses the need to enforce federal law against individual Indians, their agents, and virtually everyone else in Indian country. The sole purpose of organizing the Indian Territory was to enforce U.S. law on individual offenders.

Here, the Defendants are living in Indian country and subject to federal law. This Court should grant the Petition to interpret the Treaty of Medicine Creek consistent with the legislative intent of the treaty-making era.

VI. CONCLUSION

This court should grant this Petition to protect the civil rights of U.S. citizens who find themselves subject to tribal jurisdiction without their knowledge and consent. The historical record establishes that U.S. civil rights laws protected non-tribal members traveling through, or in, Indian country. Nothing in today's corpus of federal Indian law should be allowed to supersede that historical understanding.

Dr. Young had absolutely no reason to believe that, when he wandered into the foyer of the tribal health clinic that fateful evening, he would automatically forfeit his life, his civil rights, and any hope his heirs might have for justice.

What happened to Dr. Young was unconstitutional, unacceptable, and completely

avoidable. If the officers had acted within the bounds of the Constitution, Dr. Young would still be alive today. This Court should grant the Petition to give Dr. Young a chance to hold his killers accountable.

Respectfully submitted,

/ s /

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APPENDIX

THE SUPREME COURT
OF WASHINGTON

CHRIS YOUNG, as an individual person and as the Personal Representative of the ESTATE OF JEFFREY YOUNG Petitioner,	)	NO. 86690-2
	)	**ORDER**
	)	C/A NO. 66969-9-I
v.	)	
JOE DUENAS, Chief of Tribal Police, Defendant,	)	
JOSEPH S. FITZPATRICK Police officer, CHRISTOPHER E. DAUSCH, police officer, JOHN SCRIVNER, Police officer, JOHN DOE(S), Additional Police officers, Respondents,	)	

And)
BENJAMIN R)
ISADORE, security)
officer,)
Defendant.)

Department II of the Court, composed of Chief Justice Madsen and Justices Chambers, Fairhurst, Stephens and Gonzalez, considered the petition for review at its February 7, 2012, Motion Calendar and entered an order continuing this matter to the March 8, 2012, en banc conference. After further consideration of this matter, the Department unanimously agreed that the following order be entered:

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 5th day of March, 2012.

For the Court

/ s /

CHIEF JUSTICE

262 P.3d 527 (Wash.App. Div. 1 2011), 66969-9-I, Young v. Duenas

[Page 527]

262 P.3d 527 (Wash.App. Div. 1 2011)
164 Wn.App. 343

Chris YOUNG as an individual person and as the personal representative of the Estate of Jeffry Young, Appellant,

v.

Joe DUENAS, chief of tribal police and Benjamin R. Isadore, security officer, Defendants, Joseph S. Fitzpatrick, police officer; Christopher E. Dausch, police officer; John Scrivner, police officer; and John Doe(s), additional police officers, Respondents.
No. 66969-9-I.

Court of Appeals of Washington, Division 1.
September 12, 2011

Publication Ordered Oct. 10, 2011. [**Page 528]**

[Copyrighted Material Omitted] [**Page 529]**

Yale Lewis, III, Law Offices of O. Yale Lewis

III, Seattle, WA, for Appellant.

Ann Crary McCormick, Forsberg & Umlauf, PS, Seattle, WA, for Respondents.
APPELWICK, J.

[164 Wn.App. 346]

¶ 1 Chris Young appeals the trial court's CR 12(b)(1) dismissal of his claims for lack of subject matter jurisdiction. He argues that the defendant tribal police officers present at the time of his brother's death are not protected by the Puyallup Tribe's sovereign immunity and that the state should have subject matter jurisdiction over the case. Because the officers acted in their official capacity and within the scope of the tribe's authority, the trial court properly dismissed based on sovereign immunity. We affirm.

FACTS

¶ 2 The Puyallup Tribe is a federally recognized sovereign tribe. The Tribal Health Authority operated an inpatient drug and treatment center, located on trust land on the Puyallup reservation. On May 12, 2007, Jeffry Young arrived at the treatment center and posed as a medical doctor, attempting to gain access and to see patients. He acted in [**Page 530]** a bizarre and irrational manner. The residential attendant, Wade Iverson, denied Jeffry Young access to the facility. When Jeffry Young refused to leave the premises, Iverson called a security officer, Benjamin Isadore, for assistance. Jeffry Young again refused to leave the premises. Isadore, fearing for

Jeffry Young's safety and the safety of the patients, called the Puyallup Tribal Police for assistance.

¶ 3 Officer John Scrivner was first to arrive, followed by Officers Joseph Fitzpatrick and Christopher Dausch. Isadore indicated to the officers with a hand symbol that he believed Jeffry Young to be mentally ill. Jeffry Young continued **[164 Wn.App. 347]** to act erratically, refusing to leave or comply with instructions. The officers made the decision to detain him. Jeffry Young resisted and struggled. Officers brought him to the ground, stunning him with a stun gun so that they could apply restraints. Shortly afterwards, officers noticed Jeffry Young was not breathing. They checked his pulse and determined that he had died. The Pierce County Medical Examiner concluded that the cause of death was excited delirium syndrome. His death was classified as accidental.

¶ 4 Chris Young first brought his suit in Puyallup Tribal Court in April 2009, pursuant to the Puyallup tribal tort claims act, chapter 4.12 Puyallup Tribal Codes. That complaint named the Puyallup Tribe and the individual police officers and sought monetary damages, alleging several causes of action such as negligence and wrongful death. In January 2010, Young voluntarily moved to dismiss the suit from tribal court, and the court granted the motion.

¶ 5 On February 9, 2010, Young filed this action instead, in Pierce County Superior Court. He removed the tribe as a defendant and instead named the three responding police officers; the chief

of Tribal Police, Joe Duenas; and the security officer, Isadore. The complaint sought monetary damages based on the following claims: (1) excessive force; (2) loss of consortium; (3) violation of civil rights (Constitution); (4) violation of civil rights (42 USC § 1983); (5) attorney fees and expert witness fees; (6) wrongful death; (7) negligent hiring/retention/training. The defendants filed motions to dismiss under CR 12(B)(1) for lack of subject matter jurisdiction. The trial court conducted a hearing and granted the motions to dismiss. Young filed a motion for reconsideration. The trial court again conducted a hearing and denied the motion for reconsideration.

¶ 6 Young timely appealed. On appeal, Young stipulated to the dismissal of Duenas and Isadore and to the dismissal of the negligent hiring/retention/training claim. We granted **[164 Wn.App. 348]** that motion, subject to the requirement that Young pay associated fees incurred. Thus, the only remaining named defendants on appeal are the three responding police officers, Fitzpatrick, Dausch, and Scrivner.

DISCUSSION

¶ 7 The existence of subject matter jurisdiction over a party asserting tribal sovereign immunity is a question of law, which we review de novo. *Foxworthy v. Puyallup Tribe of Indians Ass'n,* 141 Wash.App. 221, 225, 169 P.3d 53 (2007), *review granted,* 164 Wash.2d 1019, 195 P.3d 89 (2008).

I. *Dismissal For Lack of Subject Matter Jurisdiction Based on Sovereign Immunity*

¶ 8 An Indian tribe has the undisputed authority to "employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power." *State v. Schmuck,* 121 Wash.2d 373, 382, 850 P.2d 1332 (1993) (quoting *Ortiz-Barraza v. United States,* 512 F.2d 1176, 1179 (9th Cir.1975)). Tribal police officers have the authority as employees of the tribe to briefly detain both Indians and non-Indians on the reservation until the status of the trespasser can be determined. *Id.* at 382-83, 850 P.2d 1332. *Schmuck* also reaffirmed tribes' rights to exclude persons from tribal lands and to detain alleged criminal offenders and turn them over to government officials for prosecution. *Id.* at 386-87, 850 P.2d 1332 (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) and *Duro v. Reina,* 495 U.S. 676, 110 S.Ct. 2053, 109, L.Ed.2d 693 (1990)). "The **[Page 531]** tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.... Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them.' " *Id.* at 387, 110 S.Ct. 2053 (alteration in original) (quoting *Duro,* 495 U.S. at 696-97, 110 S.Ct. 2053).

¶ 9 Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes [164 Wn.App. 349] from suit absent explicit and unequivocal waiver or

abrogation by congress. *Wright v. Colville Tribal Enter. Corp.,* 159 Wash.2d 108, 112, 147 P.3d 1275 (2006); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). This protects tribes from suit involving both governmental and commercial activities, whether those actions are conducted on or off of a reservation. *Wright,* 159 Wash.2d at 112, 147 P.3d 1275 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754-55, 118 S.Ct. 1700,140 L.Ed.2d 981 (1998)).

¶ 10 Young concedes that the tribe has sovereign immunity, but argues first that the three named police officers should be held personally liable for their conduct under a theory of agency. He sued the officers both "in their individual capacity and in their official capacity as agents/employees of the Tribe." But, the record shows that the tribal police, the Bureau of Indian Affairs, and the Piece County Prosecutor's Office all found that the officers were carrying out their duties in a lawful and proper way. No evidence directly contradicts this conclusion or suggests they acted in their individual capacity. Sovereign immunity extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority. *Wright,* 159 Wash.2d at 116, 147 P.3d 1275; *Cook v. AVI Casino Enters., Inc.,* 548 F.3d 718, 726-27 (9th Cir.2008), *cert. denied,* U.S. , 129 S.Ct. 2159, 173 L.Ed.2d 1156 (2009). The principles that motivate the immunizing of tribal officials from suit— protecting an Indian tribe's treasury and preventing a plaintiff from bypassing

tribal immunity merely by naming a tribal official—apply just as much to tribal employees when they are sued in their official capacity.... Plaintiffs ... cannot circumvent tribal immunity through "a mere pleading device." [164 Wn.App. 350] *Cook,* 548 F.3d at 727 (quoting *Will v. Michigan,* 491 U.S. 58, 70-71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

¶ 11 Young relies on the fact of death to establish an inference that the officers acted outside the scope of their authority. But, even if the fact of death established a prima facie case of misconduct outside the scope of authority, the misconduct of the tribal officer in discharge of his official duty still falls within the scope of tribal immunity. The Ninth Circuit Court of Appeals considered a similar issue arising from a non-Indian's claim against a tribal police officer. *Linneen v. Gila River Indian Cmty.,* 276 F.3d 489, 491 (9th Cir.2002). The plaintiffs in that case alleged the officer, while on tribal property, unlawfully detained them, held them in custody for three hours, and threatened them. *Id.* The court concluded that "the suit arises from defendant['s] alleged misconduct during his *official duties* as a tribal ranger on the Community's land. Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer." *Id.* at 492 (emphasis added). Here, the exact same reasoning applies. Officers Fitzpatrick, Dausch, and Scrivner were tribal employees, acting in their official capacity, for the protection and benefit of the tribe. The fact that Young died before being surrendered to non-tribal authorities does not affect the immunity of the tribe or the officers.

¶ 12 Young argues that U.S. Supreme Court case law supports his assertion that a state court should have subject matter jurisdiction over this case. He relies principally on *Montana v. United States,* and its general rule that an Indian tribe does not have the sovereign power to regulate non-Indians within the boundaries of the reservation. 450 U.S. 544, 564-65, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). But, Young's reliance on *Montana* is misplaced. First, as discussed above, the tribe, and thus the officers, **[Page 532]** had the authority to detain Jeffry Young, a non-Indian. *Schmuck,* 121 Wash.2d at 382-83, 850 P.2d 1332. And, second, here it is not **[164 Wn.App. 351]** the Puyallup tribe attempting to assert any regulatory authority over a nonmember, but instead it is Young, a nonmember, attempting to sue the tribe in a civil suit in state court. The parties dispute the applicability both of *Montana* generally and of its two exceptions for when a tribe may exercise authority over nonmembers.[1] But, we decline to address these arguments. *Montana* is inapplicable here and does not support Young's argument that state courts have jurisdiction over his case.

¶ 13 The sovereign right of self-governance requires "an accommodation between the interest of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Nevada v. Hicks,* 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (quoting *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134, 156, 100 S.Ct. 2069, 65, L.Ed.2d 10 (1980)). Young argues that Washington courts should have subject matter jurisdiction based on Washington's strong interest in regulating the conduct of its peace officers. He cites to *Hicks* and asserts that states have jurisdiction over tribes when state interests outside the reservation are implicated. But, the Puyallup Tribe has an opposing interest in self-governance. And, the state interest involved in *Hicks* was much more substantial than that involved here. In *Hicks,* the plaintiff was a tribal member suing state law enforcement officers in tribal court under 42 U.S.C. § 1983, based on their execution of state search warrants relating to off-reservation crimes. *Hicks,* at 356-57. The situation here, with a non-Indian plaintiff and with tribal police officers acting solely in their capacity as tribal officers, is very different and does not implicate state interests in the same way.**[164 Wn.App. 352]**

¶ 14 Young next argues that the 1854 Treaty of Medicine Creek constituted a limited but express Congressional abrogation of the Puyallup Tribe's sovereign immunity. 10 Stat. 1132 (1854). He argues that under the treaty, the Puyallup Indians shall not " shelter or conceal offenders against the laws of the United States, but deliver them up to the authorities

for trial." 10 Stat. 1132, art. 8 (1854). Young's argument is unpersuasive. The treaty is inapplicable on its face. The tribe is not concealing any offenders accused of violating United States law. Additionally, waiver of tribal sovereign immunity must be explicit and unequivocal. *Santa Clara Pueblo,* 436 U.S. at 59, 98 S.Ct. 1670. The language of the treaty does not constitute such an explicit or unequivocal abrogation of sovereign immunity here. Young also expressly conceded to the Puyallup Tribe's sovereign immunity in his brief.

II. *Public Law 280 and RCW 37.12.010*

¶ 15 Young argues that the superior court had subject matter jurisdiction over this matter under Public Law 280. Congress enacted Public Law 280 in 1953. Pub.L. No. 85-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360). Public Law 280 gave states the power to exercise jurisdiction over Indians for civil actions and criminal offenses committed on Indian reservations without the consent of the Indian tribe. Pub.L. 280, § 6; *In re Estate of Cross,* 126 Wash.2d 43, 47, 891 P.2d 26 (1995). Pursuant to Public Law 280, Washington State extended full criminal and civil concurrent jurisdiction to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved.[2] [164 Wn.App. 353] RCW 37.12.010; **[Page 533]** LAWS OF 1963, ch. 36, § 1; *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 475, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

¶ 16 Young argues that Public Law 280 confers jurisdiction over Young's claims because they involve a dispute between nonmembers. But, this argument is unpersuasive for the same reasons articulated above. Pub.L. 280 and RCW 37.12.010 do not confer subject matter jurisdiction where subject matter jurisdiction is already precluded by sovereign immunity. If the officers in this case were acting in their individual and private capacities as nonmembers, RCW 37.12.010 could confer subject matter jurisdiction on the state, based on the officers' interaction with Young, also a nonmember. But, the officers were acting in their official capacity as tribal employees, within the scope of the tribe's authority. *Schmuck,* 121 Wash.2d at 382, 850 P.2d, 1332.RCW 37.12.010 and Pub.L. 280 do not extend the State's jurisdiction to sovereign tribal governments, their entities, or their employees. *Wright,* 159 Wash.2d at 116, 147 P.3d 1275. We reject Young's argument and hold that RCW 37.12.010 does not confer jurisdiction on the State.

II. *Young's 42 U.S.C. § 1983 Claim*

¶ 17 Young next addresses his constitutional claims arising under 42 U.S.C. § 1983. The trial court's decision to **[164 Wn.App. 354]** grant dismissal on this claim was presumably not based on a lack of subject matter jurisdiction in the same way that it was for the tort claims. Instead, as respondent Isadore argues, this claim was dismissed because the complaint failed to allege or prove the essential elements of a 42 U.S.C. § 1983 claim.

¶ 18 In order to prevail on his 42 U.S.C. § 1983 claim, a plaintiff must demonstrate two essential elements: (1) that defendant's conduct deprived plaintiff of a constitutionally protected right, and (2) that the deprivation was the result of state action. *See, e.g., Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 11-12, 829 P.2d 765 (1992). Young has failed to satisfy either of these elements.

¶ 19 First, Young argues that the three police officers were state actors. He relies on *Bressi v. Ford,* 575 F.3d 891, 893 (9th Cir.2009), a case where tribal police officers set up a roadblock on a state highway that ran through an Indian reservation. A nonmember alleged that the officers violated his constitutional rights by detaining him for four hours without probable cause. *Id.* at 894. The roadblock, the arrest of non-Indians, and the issuance of citations for violation of state law, were all done under the color of state law. *Id.* at 897. The officers in that case conceded that they were acting under color of state law, based on their certification as Arizona Peace Officers. *Id.* at 895. Accordingly, the officers were obliged to follow constitutional safeguards and were subject to a 42 U.S.C. § 1983 claim if they failed to do so. *Bressi,* 575 F.3d at 897. But, *Bressi* is plainly distinguishable from the facts here. The three police officers in this case were not enforcing state law on a state highway, but were enforcing tribal law on tribal lands. And, their authority under tribal law to detain **[Page 534] [164 Wn.App. 355]** a non-Indian trespasser on tribal lands is well established. *See, e.g., Schmuck,* 121 Wash.2d at 387-88, 850 P.2d 1332.

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¶ 20 Young's complaint asserted that the officers took state action based on the fact that they are commissioned peace officers pursuant to Washington's tribal police officer certification statute, RCW 43.101.157. RCW 43.101.157(1) provides: Tribal governments may voluntarily request certification for their police officers. Tribal governments requesting certification for their police officers must enter into a written agreement with the commission. The agreement must require the tribal law enforcement agency and its officers to comply with all of the requirements for granting, denying, and revoking certification as those requirements are applied to peace officers certified under this chapter and the rules of the commission.

¶ 21 Young provides evidence that the three officers attended academy classes and were certified through the Washington State Criminal Justice Training Commission. But, while RCW 43.101.157(1) provides a mechanism for tribal officers to gain state certification, the mere fact that the officers took certification classes does not establish that they were conducting state action when they detained Jeffry Young. The more relevant analysis is the actual function of the action taken by the officers and whether that action was an exercise of either tribal or state authority. The *Bressi* court, in analyzing the nature of the officers' action in setting up the roadblock, stated:

> These actions established, beyond any dispute of fact, that the roadblock functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state

> law. We emphasize function, rather than intent, because function is a more readily ascertainable guide to conduct and furnishes a more practical rule for determining whether a roadblock is operated (at least in part) under color of state law. *Bressi,* 575 F.3d at 897.

Here, the officers were acting under their tribal authority, fulfilling their professional duties. **[164 Wn.App. 356]** There are no facts demonstrating that they acted jointly with, or under authority of any agency of Washington State government, nor were they enforcing Washington State laws. We hold that the officers' action did not constitute state action, and thus, that Young has not supported his 42 U.S.C. § 1983 claim.

¶ 22 Young also fails to satisfy the other element of a 42 U.S.C. § 1983 claim, that the officers' conduct deprived him of a constitutionally protected right. *Sintra,* 119 Wash.2d at 11-12, 829 P.2d 765. This is because the United States Constitution constrains the federal and state governments, but it does not generally apply in the same way to Indian tribes. As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus in *Talton v. Mayes,* 163 U.S. 376[, 16 S.Ct. 986, 41 L.Ed. 196] (1896), [the U.S. Supreme Court] held that the Fifth Amendment did not " operat[e] upon" the " powers of local self-government enjoyed" by the tribes. *Santa Clara Pueblo,* 436 U.S. at 56, 98 S.Ct. 1670 (second alteration in original)

(quoting *Talton,* 163 U.S. at 384, 16 S.Ct. 986). The Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. *Hicks,* 533 U.S. at 383, 121 S.Ct. 2304. Instead, individual rights are protected against tribal government action based solely on express congressional action taken to limit, modify, or eliminate their powers of local self-government. *Santa Clara Pueblo,* 436 U.S. at 57-58, 98 S.Ct. 1670. In this case, individual rights are protected by the Indian Civil Rights Act, 25 U.S.C. § 1302. But, actions taken by tribal employees under color of tribal law are beyond the reach of 42 U.S.C. § 1983. *Santa Clara Pueblo,* 436 U.S. at 56, 98 S.Ct. 1670; *Evans v. McKay,* 869 F.2d 1341, 1347 (9th Cir.1989). Because Young has failed to satisfy either element of his 42 U.S.C. § 1983 claim, the trial court correctly dismissed his claim. **[164 Wn.App. 357**]

IV. *Attorney Fees*

¶ 23 Young requests attorney fees based on RAP 18.1(a) and 42 U.S.C. § 1988(b). **[Page 535]** Because Young is not the prevailing party, he is not entitled to attorney fees on appeal.

¶ 24 We affirm.

WE CONCUR: SPEARMAN, J., and LEACH, A.C.J.

--------- Notes:

[1] The first *Montana* exception arises when a non-Indian enters into a consensual relationship with a tribe, such as an employment or contractual relationship. 450 U.S. at 565-66, 101 S.Ct. 1245. The second exception protects a tribe's " inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. 1245.

[2] The statute states:
The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:(1) Compulsory school attendance; (2) Public assistance; (3) Domestic relations;

(4) Mental illness; (5) Juvenile delinquency; (6) Adoption proceedings; (7) Dependent children; and(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted. RCW 37.12.010; LAWS OF 1963, ch. 36, § 1.

[3] Young argues that Washington state courts have jurisdiction to hear his case because tribal courts lack jurisdiction over matters of federal law, including, specifically, civil rights claims. As an initial matter, this argument is based on a flawed premise. Young contends that where a tribal court lacks jurisdiction to hear a claim, State jurisdiction must automatically arise, but he fails to provide support for this assertion.

TREATY WITH THE NISQUALLI, PUYALLUP, ETC., 1854.

Dec. 26, 1854. | 10 Stat., 1132. | Ratified Mar. 3, 1855. | Proclaimed Apr. 10, 1855.

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S"Homamish, Stehchass, T" Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget"s Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the

point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly **[*662]** direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon"s Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2.

There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley"s and Totten"s Inlets, and separated from Hartstene Island by Peale"s Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked

out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3.

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

ARTICLE 4.

In consideration of the above session, the United States agree to pay to the said tribes and bands the

sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree **[*663]** to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6.

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted,

remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8.

The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge,

and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof,

and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities. **[*664]**

ARTICLE 11.

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12.

The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Isaac I. Stevens, [L. S.]
Governor and Superintendent Territory of Washington.

Qui-ee-metl, his x mark. [L. S.]
Sno-ho-dumset, his x mark. [L. S.]
Lesh-high, his x mark. [L. S.]
Slip-o-elm, his x mark. [L. S.]
Kwi-ats, his x mark. [L. S.]
Stee-high, his x mark. [L. S.]

Di-a-keh, his x mark. [L. S.]
Hi-ten, his x mark. [L. S.]
Squa-ta-hun, his x mark. [L. S.]
Kahk-tse-min, his x mark. [L. S.]
Sonan-o-yutl, his x mark. [L. S.]
Kl-tehp, his x mark. [L. S.]
Sahl-ko-min, his x mark. [L. S.]
T"bet-ste-heh-bit, his x mark. [L. S.]
Tcha-hoos-tan, his x mark. [L. S.]
Ke-cha-hat, his x mark. [L. S.]
Spee-peh, his x mark. [L. S.]
Swe-yah-tum, his x mark. [L. S.]
Cha-achsh, his x mark. [L. S.]
Pich-kehd, his x mark. [L. S.]
S"Klah-o-sum, his x mark. [L. S.]
Sah-le-tatl, his x mark. [L. S.]
See-lup, his x mark. [L. S.]
E-la-kah-ka, his x mark. [L. S.]
Slug-yeh, his x mark. [L. S.]
Hi-nuk, his x mark. [L. S.]
Ma-mo-nish, his x mark. [L. S.]
Cheels, his x mark. [L. S.]
Knutcanu, his x mark. [L. S.]
Bats-ta-kobe, his x mark. [L. S.]
Win-ne-ya, his x mark. [L. S.]
Klo-out, his x mark. [L. S.]
Se-uch-ka-nam, his x mark. [L. S.]
Ske-mah-han, his x mark. [L. S.]
Wuts-un-a-pum, his x mark. [L. S.]
Quuts-a-tadm, his x mark. [L. S.]
Quut-a-heh-mtsn, his x mark. [L. S.]
Yah-leh-chn, his x mark. [L. S.]

To-lahl-kut, his x mark. [L. S.]
Yul-lout, his x mark. [L. S.]
See-ahts-oot-soot, his x mark. [L. S.]
Ye-takho, his x mark. [L. S.]
We-po-it-ee, his x mark. [L. S.]
Kah-sld, his x mark. [L. S.]
La"h-hom-kan, his x mark. [L. S.]
Pah-how-at-ish, his x mark. [L. S.]
Swe-yehm, his x mark. [L. S.]
Sah-hwill, his x mark. [L. S.]
Se-kwaht, his x mark. [L. S.]
Kah-hum-klt, his x mark. [L. S.]
Yah-kwo-bah, his x mark. [L. S.]
Wut-sah-le-wun, his x mark. [L. S.]
Sah-ba-hat, his x mark. [L. S.]
Tel-e-kish, his x mark. [L. S.]
Swe-keh-nam, his x mark. [L. S.]
Sit-oo-ah, his x mark. [L. S.]
Ko-quel-a-cut, his x mark. [L. S.]
Jack, his x mark. [L. S.]
Keh-kise-bel-lo, his x mark. [L. S.]
Go-yeh-hn, his x mark. [L. S.]
Sah-putsh, his x mark. [L. S.]
William, his x mark. [L. S.]

Executed in the presence of us— —
M. T. Simmons, Indian agent.
James Doty, secretary of the commission.
C. H. Mason, secretary Washington Territory.
W. A. Slaughter, first lieutenant, Fourth Infantry.
James McAlister,

E. Giddings, jr.
George Shazer,
Henry D. Cock,
S. S. Ford, jr.,
John W. McAlister,
Clovington Cushman,
Peter Anderson,
Samuel Klady,
W. H. Pullen,
P. O. Hough,
E. R. Tyerall,
George Gibbs,
Benj. F. Shaw, interpreter,
Hazard Stevens.

Honorable Susan Keers Serko
Motion Calendar Date & Time: Friday, May 7, 2010 9:00 a.m.
Defendants' Duenas, Scrivner, Dausch and Fitzpatric Motion to Dismiss with Oral Orgument

SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

CHRIS YOUNG as an individual person and as the Personal Representative of the ESTATE OF JEFFRY YOUNG Plaintiff, Vs. JOE DUENAS, Chief of Tribal Police, JOSEPH S. FITZPATRICK,	**NO. 10-2-06346-9** ORDER GRANTING DEFENDANT DUENAS, FITZPATRICK, DAUSCH, AND ISADORE'S MOTION TO DISMISS WITH PREJUDICE [CR 12 (B) (1)] **[CLERK'S**

police officer, CHRISTOPHER E. DAUSCH, police officer, JOHN SCRIVNER, police officer, JOHN DOE(s), additional police officers, and Benjamin R. Isadore, security officer, Defendants.	**ACTION REQUIRED]**

This matter came before this court on the Motions of Defendants DUENAS, FITZPATRICK, DAUSCH, SCRIVNER and ISADORE to Dismiss All Claims under Civil Rules 12 (b) (1). The Court has heard the arguments of counsel, reviewed the materials in the Court file, and reviewed the following material in support of and in opposition to this motion, including:

1. Motion of Dismiss of Defendants DANIEL J. DUENAS, JOSEPH S. FITZPATRICK, CHRISTOPHER E. DAUSCH, JOHN SCRIVNER;

2. McCormick Declaration with Exhibits A-F;

3. Corbett Declaration wioth Exh. A: GIS Map;

4. Duenas Declaration;

5. Plaintiff's Response to Dismiss (Tribal Officers), including:

(a) Declaration of Counsel re Trust Land and Agreements with Exhibits;

(b) Declaration of Counsel re Tribal Court Litigation with Exhibits;

(c Declaration of Greg Baxter with Exhibits;

(d) Declaration of Winthrop E. Taylor;

(e) Declaration of Carl Wigren;

5A PLAINTIFFS RESPONSE TO MOTION TO DISMISS DEFENDANT SECURITY GUARD

6. Defendant's Reply to Opposition, including:

(a) Supplemental McCormick Declaration with Exhibits;

(b) Declaration of Timothy Reynon;

(c) Declaration of Paul Arnold with Exhibits;

(d) Supplemental Declaration Daniel J. Duenas with Exhibits;

7. Court file;

8. JOINDER AND CONCURRENCE IN MOTION OF TRIBAL LAW ENFORCEMENT OFFICERS TO DISMSS AND MOTION OF DEFENDANT ISADORE TO DISMISS

a. DECLARATION OF ISADORE

b. REPLY OF ISADORE TO PLAINTIFF'S RESPONSE

9. ORIGINAL CERTIFIED COPY OF BUREAU OF INDIAN AFFAIRS TITLE STATUS REPORT

ORDERED, ADJUDGED AND DECREED that Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to CR 12(b)(1) are hereby GRANTED. The Court finds that it lacks subject matter jurisdiction over this matter and therefore, all of Plaintiffs' claims against Defendants DUENAS, FITZPATRICK, DAUSCH, and

SCRIVNER and ISADORE and this lawsuit are hereby dismissed with prejudice.

This order may be entered immediately upon execution.

DONE IN OPEN COURT this 7 day of May, 2010

/s/

_____

HONORABLE SUSAN KEERS SERKO

PUYALLUP TRIBAL COURT
PUYALLUP INDIAN RESERVATION
PUYALLUP, WASHINGTON

CHRIS YOUNG as an individual person and as the Personal Representative of the ESTATE OF JEFFREY YOUNG Plaintiff, Vs. PUYALLUP INDIAN TRIBE And JOHN AND/OR JANE DOE individual police officers Defendants.	**NO.** PUY-CV-04/09-068 ORDER ON MOTION TO STRIKE AND DISMISS

THIS MATTER, having come before the court on the Plaintiff's motion to strike and

dismiss, the court being fully advised of the premises, it is hereby ordered:

The case is DISMISSED with prejudice.

DATED in PUYALLUP, this _26th___ day of JANUARY, 2010

Unsigned / S /

_____
Chief Judge Longfox

Presented by:

/ S /

_____
O. Yale Lewis III

IN THE TRIBAL COURT OF THE PUYALLUP TRIBE OF INDIANS FOR THE PUYALLUP INDIAN RESERVATION TACOMA, WASHINGTON

CHRIS YOUNG, as an Individual person And as the personal Representative of the ESTATE OF JEFFREY YOUNG,	)	No. PUY-CV-04/09-068
Plaintiff,	)	SUA SPONTE MOTION AND ORDER TO APPEAR FOR A PRETRIAL CONFERENCE
vs.	)	
PUYALLUP INDIAN TRIBE And JOHN AND/OR JANE DOE, individual Tribal police officers,	)	
Defendants.	)	

COMES NOW this Court, by and through its own motion, and orders the parties to appear for a pretrial conference in this matter.

mm

Under the Puyallup Civil Procedure Code § 4.02.201, "[i]n the interest of saving time, simplifying issues, and avoiding unnecessary litigation, the judge may schedule a pretrial conference with all parties in a civil action." As such, the parties are ordered to appear before this Court on **Tuesday, January, 23, 2010, at 10:00 a.m.** for a pretrial conference.

Moreover, "*[t]he parties and the judge should discuss areas where the parties are in agreement and areas where they disagree*." *Id*. (Italics ours.) According to the complaint, the Plaintiff asserts that this Court has subject matter jurisdiction to decide this case, and according to the answer, the Defendants assert that it does not. As such, one of the areas of discussion, *inter alia*, is whether this case should be dismissed with prejudice, because this Court lacks subject matter jurisdiction based upon the doctrine of sovereign immunity?

SO ORDERED this 4th day of January, 2010.

Chief Judge Long Fox /s/

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